Proposition 207,

Smart and Safe – Legal Issues Q&A

1. ***Are §§ 36-2852 and 36-2853(B)(1) retroactive?*** No.

   A.R.S. § 1-246 requires application of the penalty in effect at the time an offense is committed. However, note, Proposition 207 enacted A.R.S. § 36-2862(G) that provides for dismissal of cases after its December 1 effective date. Potential scenarios may include:

   a. ***The offense is committed prior to the effective date, can it be charged on or after the effective date?*** Yes.

      However, prosecutors are unlikely to prosecute offenses under these statutes that will be pending and subject to dismissal under A.R.S. § 36-2862(G) after the December 1 effective date.

   b. ***The offense is committed and charged prior to the effective date, can it be tried after the effective date?*** Yes.

      However, the defendant may move to dismiss the case before trial pursuant to A.R.S. § 36-2862(G) if the prosecutor does not do so.

   c. ***The offense is committed and charged prior to the effective date, can it be sentenced after the effective date?*** Yes.

      However, the defendant may move to dismiss the case before trial pursuant to A.R.S. § 36-2862(G) if the prosecutor does not do so.

2. ***What is the effective date of § 36-2862(G) regarding dismissal of any pending complaint, information or indictment?*** The effective date of the Act (December 1, 2021), not the effective date for expungement. Generally, the entire initiative takes effect on the same date unless otherwise stated. For example, there is a July 12, 2021 effective date for expungement specifically. However, subsection G has to do with a motion to dismiss, not expungement. There is no such delayed effective date for subsection G.

3. ***Are surcharges and assessments applicable to the civil marijuana violation?*** No. The language of §§ 12-116.01, 12-116.02, and 12-116.04 makes it clear that surcharges are to be levied only for criminal offenses, civil traffic violations, violations of the motor vehicle statutes, any local ordinance relating to the stopping, standing, or operation of a vehicle, or a violation of the game and fish statutes in Title 17. Civil marijuana violations do not fall into any of these categories, therefore, surcharges cannot be imposed for civil marijuana violations. Surcharges pursuant to A.R.S. § 16-954 also cannot be imposed for civil marijuana violations since A.R.S. § 16-954 operates through the applicability of § 12-116.01.

   Similarly, the language of §§ 12.114.01, 12-116.08, 12-116.09, and 12-116.10 does not provide for applicability of these assessments to violations other than criminal offenses, civil traffic violations, violations of the motor vehicle statutes, any local ordinance relating to the stopping, standing, or operation of a vehicle, or a violation of the game and fish statutes in Title 17. Accordingly, these assessments cannot be applied to civil marijuana violations.

4. ***Does the Time Payment fee apply to civil marijuana violations?*** Yes. A.R.S. § 12-116(A) states that "a fee of twenty dollars shall be assessed on each person who pays a court ordered penalty, fine or sanction on a time payment basis." Unlike surcharges and assessments, the applicability of § 12-116(A) is not dependent on the offense or violation type but rather is dependent on the type of monetary obligation imposed. Under § 12-116(A), any penalty paid on a time payment basis is subject to a time payment fee. Since A.R.S. § 36-2853(B) contemplates imposition of a civil penalty, it clearly falls within the purview of § 12-116(A). Accordingly, if a person pays a civil marijuana penalty on a time payment basis, a time payment fee must be assessed. This fee cannot be waived or suspended.

5. ***Does a Justice of the Peace have jurisdiction to hear civil marijuana cases?*** Not under the Act. As a civil violation, jurisdiction is not conferred by Title 22, Chapter 3, Criminal Proceedings in Justice Court, as that chapter (as opposed to

the municipal court jurisdiction) specifically references "misdemeanors and criminal offenses." However, Administrative Order 2020-184 issued by the Chief Justice on November 25, 2020 permits filing of a civil marijuana case in the Justice Court, pending legislative and Supreme Court Rules action.

6. ***Can a Justice Court hearing officer hear civil marijuana cases?*** No.
   A justice court civil traffic hearing officer's authority to hear civil traffic matters arises from A.R.S. § 28-1553(A), which is specifically limited to civil traffic. Accordingly, Title 22 must be amended to allow civil traffic hearing officers to hear civil marijuana cases.

7. ***Does the municipal court have jurisdiction to hear civil marijuana cases?*** Yes. Pursuant to A.R.S. § 22-402(B), a municipal court, and all its judicial officers, have jurisdiction to hear civil marijuana cases since the cases arise as a result of a violation of Arizona law.

8. ***Can a municipal court hearing officer hear civil marijuana cases?*** Yes.
   Pursuant to A.R.S. § 22-402(B), a municipal court, and all its judicial officers, have jurisdiction to hear civil marijuana cases since the cases arise as a result of a violation of Arizona law.

9. ***Is a juvenile adjudicated for a civil violation pursuant to § 36-2853(B)(1) considered to be a delinquent child?*** Yes.
   "Delinquent juvenile" is defined in § 8-201(13) as having been adjudicated of committing a "delinquent act." A delinquent act, as defined in § 8-201(12), includes an act by a juvenile that if committed by an adult would be a criminal offense or a petty offense, or a violation of any law of this state. A civil marijuana violation is a violation of state law for an 18-20 year old adult. Therefore, a civil marijuana violation is a delinquent act if committed by a juvenile.

10. ***Should § 8-202(E) and 323(B) relating to juvenile hearing officers be amended to permit juvenile hearing officers to hear a civil marijuana violation?*** Yes.

    § 8-202(E) and § 8-323(B) should be amended as a Juvenile Hearing Officer does not otherwise have jurisdiction over drug cases. Until the legislature can act, Administrative Order 2020-184 issued by the Chief Justice on November 25, 2020 permits a juvenile hearing officer to hear a civil marijuana violation.

11. ***Does § 28-2852(B) affect the application of § 28-1381(A)(3), DUI per se, and § 5-395(A)(3), Boating OUI, per se, as it applies to marijuana?*** Yes.

    For a person to be guilty of DUI Drugs (Marijuana) the state must prove the person is impaired to the slightest degree. DUI per se no longer applied to marijuana in person's system. § 28-1381(A)(3), states that it is illegal to drive with any drug defined in § 13-3401 or its (active) metabolite in the person's body (similar language is found in § 5-391(A)(3). However, the act sets forth the law regarding DUI in two statues. § 36-2852(B) reads,

    > "Notwithstanding any other law, a person with a metabolite or components of marijuana in the person's body is guilty of violating section 28-1381, subsection A, paragraph 3 only if the person is also impaired to the slightest degree"

    In addition, § 36-2851, reads in pertinent part,

    > This Chapter
    >
    > …..
    >
    > 3. Does not allow driving, flying or boating while impaired to even the slightest degree by marijuana or prevent this state from enacting and imposing penalties for driving, flying or boating while impaired even to the slightest degree by marijuana"

12. ***Is a motion to dismiss pursuant to § 36-2862(G) permitted if the person has already been sentenced and the sentence (or suspension of sentence) is not completed?*** No.

    A.R.S. § 36-2862(G) states "[o]n motion, the court shall dismiss with prejudice any pending complaint, information or indictment based on any offense set forth in [§ 36-2862(A)], to include charges or allegations based on or arising out of conduct occurring before the effective date of this chapter." The operation of the dismissal provision in § 36-2862(G) is dependent on whether the complaint, information, or indictment is pending when the motion to dismiss is filed. If a person has been sentenced, it follows that the complaint, information, or indictment is no longer pending. Therefore, the motion to dismiss cannot be granted.

13. ***Who has the burden of going forward on a § 36-2862(G) motion to dismiss?*** The defendant. Generally, the person who files the motion has the burden, unless otherwise stated. For example, in the expungement process, it is stated that the prosecutor has the burden of proof. However, a specific burden of proof is not provided in § 36-2862(G). Accordingly, the defendant, as the movant, would have the burden.

14. ***If a person under 21 has a Medical Marijuana card (or if under 18, a caregiver has the card) can the person possess up to 2.5 ounces regardless of Prop 207?*** Yes.

    § 36-2816(A) permits a registered qualifying patient to obtain up to 2.5 ounces of marijuana from registered nonprofit medical marijuana dispensaries in any fourteen-day period. § 36-2811 states that there is a presumption that a qualifying patient or designated caregiver is engaged in the medical use of marijuana if the qualifying patient or designated caregiver is in possession of a registry identification card and is in possession of an amount of marijuana that does not exceed the allowable amount of marijuana, which is 2.5 ounces. Read together the person can possess up to 2.5 ounces under the Medical Marijuana Act. Proposition 207 does not repeal that provision of law.

15. ***Can a condition of probation prohibit use of marijuana that is permitted under Arizona law?*** Likely no.

    Under § 36-2852(A) adopted by proposition 207, imposing a penalty of any kind and limiting a privilege solely due to lawful use of marijuana is prohibited. In considering substantially similar language of the Arizona Medical Marijuana Act (AMMA), the Arizona Supreme Court held that probation and the medical use of marijuana were privileges and that revocation of probation due to the permitted medical use of marijuana was a penalty and denial of a privilege prohibited by the AMMA. Likewise, if a probation condition prohibits or restricts recreational marijuana use permitted under Proposition 207, the court would likely conclude the condition violates § 36-2852(A) by denying either the privilege of lawfully using marijuana or the privilege of being on probation without the threat of a penalty for lawful use.

    Probation conditions may prohibit unlawful possession and use of marijuana, such as, in a public place. Probation conditions may also address abuse of marijuana that causes impairment in circumstances where impairment is prohibited, such as DUI. A condition may require the probationer to attend a treatment program.

16. ***Is a drug test result that finds marijuana in a probationer's system grounds for a violation of probation?*** No.

    Revoking probation is a penalty under Arizona law. See *State v. Lyons*. The Act specifically dictates that possession or consumption of marijuana under the threshold amount "cannot constitute the basis for … the imposition of penalties of any kind under the laws of this state or locality." § 36-2852. Moreover, as a practical matter, it would be impossible to determine whether the probationer consumed more than the threshold amount decriminalized by the Act.

17. ***If probation has been imposed for a marijuana conviction and the probation is terminated, must the Court still enter a criminal restitution order (CRO)?*** Yes.

    The Court must issue a CRO for fines, fees, penalties and victim restitution (if applicable) as required by A.R.S. § 13-805(C). *See State v. Pinto*, 179 Ariz. 593 (App. 1994) (court retains jurisdiction until such time that amounts have been paid in full or until the sentence expires, whichever occurs last).

18. ***Is a petty offense or misdemeanor possession of marijuana conviction a strike under § 13-901.01?*** Yes.

    § 13-901.01 states that "any person who is convicted of the personal possession or use of a controlled substance or drug paraphernalia is eligible for probation." Both a misdemeanor and petty offense are criminal offenses (§ 13-601).

19. ***Is a civil marijuana violation a strike under § 13-901.01?*** No.

    § 13-901.01 states that "any person who is convicted of the personal possession or use of a controlled substance or drug paraphernalia is eligible for probation." A civil violation is not a criminal offense; it is not listed in the classification of criminal offenses (§ 13-601). Therefore, a civil violation is not a strike under § 13-901.01.

20. ***Is the burden of proof for the civil violation different than that of a petty offense or misdemeanor?*** Yes.

    Long standing law is that the burden of proof for a civil case is preponderance of the evidence. Since a petty offense is a criminal offense (§ 13-601), the burden of proof is beyond a reasonable doubt.

21. ***Is there a look back period to allege a "prior" increasing the classification of a person under twenty-one years of age possessing one ounce or less of marijuana or misrepresenting age?*** No.

    Unlike DUI or Domestic Violence, which has a seven-year look-back period, § 36-2853 does not contain one. Therefore, the look back period is not limited. Note, however, due to a court's purge policy the file might not be available.

22. ***Does a prosecutor need to plead and prove a prior violation or conviction to enhance a civil violation or petty offense under § 36-2853?*** Yes.

    Due process requires that the prior violation be pled and proven in order to enhance the classification and sentence.

23. ***May a conviction for a petty offense for use of marijuana affect a person's immigration status?*** Yes.

    Depending on the quantity of marijuana, a non-citizen may be determined to be "deportable," not "admissible," not of "good moral character," and not eligible for discretionary waivers of certain requirements. 8 USC § 1227(a)(2)(B)(i) provides: "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams (1oz) or less of marijuana, is deportable."

24. ***May an adjudication of responsible for a civil marijuana violation affect a person's immigration status?*** Yes.

    Depending on the quantity of marijuana, and whether federal authorities consider the state adjudication a "conviction" under federal law, a non-citizen may be determined to be "deportable," not "admissible," not of "good moral character," and not eligible for discretionary waivers of certain requirements. 8 USC § 1227(a)(2)(B)(i) provides: "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or

regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams (1oz) or less of marijuana, is deportable." Therefore, a person under 21 years of age would not be deportable due to a disposition of responsible for a civil violation under A.R.S. § 36-2352(B) since that disposition is for less than 1 oz of marijuana. However, the other immigration consequences described above may apply.

25. ***Should the immigration advisement required by Rule 17.2(b) of the Rules of Criminal Procedure be provided for criminal marijuana offenses?*** Yes. This advisement must be provided by the court when a plea of guilty or no contest is accepted for misdemeanor or petty offense violations of A.R.S. § 36-2853.

26. ***Should the immigration advisement be provided for civil marijuana violations?*** Due to the potential immigration consequences of a disposition of responsible for a civil violation under A.R.S. § 36-2352(B) identified in the response to question 24, the content and method for advising a defendant of these consequences will be addressed by further discussions and a possible rule amendment.

27. ***Is a petty offense an underlying offense, for § 13-2506, FTA in the 2nd degree?*** Yes. § 13-2506(A)(1) reads in pertinent part, "A person commits failure to appear in the second degree if, having …. [b]een required by law to appear in connection with any misdemeanor or petty offense, the person knowingly fails to appear as required, regardless of the disposition of the charge requiring the appearance."

28. ***Is § 36-2851(8)(b) an enforcement section and if so, what is the penalty?*** No. § 36-2851(8)(b) states,

> This chapter
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> …
>
> 8. Does now allow a person to

…..

(b) Consume marijuana or marijuana products while driving, operating or riding in the passenger seat or compartment of an operating motor vehicle, boat vessel, aircraft or another vehicle used for transportation."

Unlike paragraph (8)(a) of the same section relating to smoking marijuana in a public place, that does have a penalty provision in § 36-2853(C), paragraph (8)(b) does not. Therefore, paragraph (8)(b) does not affirmatively define the act as a crime that can be cited under this statute. However, depending on the facts, a DUI charge pursuant to § 28-1381 may be appropriate. (See question 11).

29. § 36-2865 permits a citizen to file a Special Action to compel DHS to take certain action. Since the defendant is a state agency, is a Special Action filed in Maricopa County Superior Court? Yes.

A Special Action against a state agency could be filed in any county but the attorney general can obtain a change of venue to Maricopa County upon written demand.

A.R.S. § 12-822, states,

"In an action against this state upon written demand of the attorney general, made at or before the time of answering, served upon the opposing party and filed with the court where the action is pending, the place of trial of any such action shall be changed to Maricopa county."